

IN THE MATTER OF THE ARBITRATION BETWEEN
ARROWHEAD REGIONAL CORRECTIONS

and

BMS #06-PA-228
Discharge

AFSCME MINNESTOA COUNCIL 5,
AFL-CIO

Appearances: For the Union: John Westmoreland
 Field Representative

 For the Employer: Dale Harris, Esq.
 Asst. County Attorney

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the Minnesota Bureau of Mediation Services. A hearing was held in the above matter on January 12, 2006 in Duluth, Minnesota. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to do closing arguments in lieu of filing briefs. The arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties agreed upon the following issues:

Did the Employer have just cause to discharge the Grievant? If not what is the appropriate remedy?

BACKGROUND

Arrowhead Regional Corrections, hereinafter referred to as the Employer, operates correctional systems in several different Counties in Northeast Minnesota. Their employees are represented by AFSCME, Council 5, hereinafter referred to as the Union.

Grievant began employment with the Employer in December of 1985. He was employed as a Probation Officer. During his employment he received excellent evaluations. His Supervisors commented on the extra effort he often displayed. There is no record of any prior discipline taken against the Grievant.

Grievant was on Medical Leave for anxiety towards the end of 2004. He returned in December. At that time, he was given a “service center” caseload that consisted of individuals who were nearing the end of their probationary period or who required minimal intervention. Grievant indicated that he received over 200 such cases.

One of the cases Grievant was given was for an individual named Catherine,¹ who was only 7 months from the end of her probationary period. She had been arrested for drug possession and convicted for that offense in August of 2003. She was placed on probation for two years. If she satisfactorily completed the probationary period, the offense would be reduced to a misdemeanor. She had completed most of the requirements by the time her case was transferred to Grievant.

Catherine had been working as a telemarketer sometime prior to her meeting Grievant, but had given up that job. She was working as dancer at

¹ For purposes here, she will be referred to as Catherine rather than using her full name.

Sugar Daddy's Gentlemen's Club for several months prior to her first meeting with Grievant. At the club, she danced nude.

Catherine was required to meet with her parole officer on a monthly basis. She had been assigned a different parole officer up until the end of 2004. It was at that time that her case was transferred to Grievant. They first met in early January of 2005. Catherine told Grievant that she had changed jobs and that she was now working at Sugar Daddy's. Grievant was familiar with the club and frequented it himself on several occasions prior to their meeting. During the meeting, Catherine had told Grievant she quit the telemarketing job because she did not like harassing people. Grievant made a comment to the effect that she did not like harassing people, but that she now must have liked getting harassed herself. He was referring to her current job. Catherine did not respond to that comment.

Grievant while off-duty went to Sugar Daddy's on January 8, 2005. Catherine was working that night. Catherine testified² that she thought she recognized Grievant and asked a co-worker to go up to him and find out his name. The co-worker approached Grievant and asked him his name. Grievant stated that his name was "Larry" and that he was farm boy. That was not Grievant's real name. Catherine did not approach Grievant that evening and they had no conversation. Grievant testified that he did not see Catherine that night and that he did not know she was working that day. He also testified that he did not go there for the purpose of trying to see Catherine dance.

² Catherine was not at the hearing, but her video deposition was taken and played at the hearing.

Grievant again went to Sugar Daddy's on January 11, 2005. Catherine was not working that night. A fellow employee told Catherine that the same individual she had inquired about on January 8 was there again on the 11th. Catherine still was not sure at that point that this person was Grievant.

Grievant went to Sugar Daddy's a third time on January 12, 2005 around midnight. Catherine was working that night. Grievant testified that Catherine came to the table where he was seated and talked to him. She offered to perform a "lap dance." Grievant turned down the request and told her that "would not be cool." Catherine agrees that she offered Grievant a lap dance, which he refused. She further stated that when she asked him his name, he gave her a false name. Grievant did not leave after this exchange, but remained for some period of time. Grievant testified that while he was there, Catherine never took a turn on the stage, but she did join another dancer for one song and performed topless. That was the only time he saw her in any form of undress.

Grievant had one more encounter with Catherine on the evening of the 12th or early morning hours of the 13th. Grievant saw Catherine as he was leaving. Catherine was sitting with a co-worker at a table. Grievant testified that he told her that he was not there to hassle her and he hoped she would not hassle him for being there. He stated she had a puzzled look on her face like she did not know who he was. He then said "Catherine" I will see you later. None of the dancers at the Club use their real name. Catherine's stage name was Trinity. She was dismayed that Grievant called her by her real name. She also knew for certain at that point that it was her new probation officer that she had been

seeing. Catherine's testimony was similar to that of Grievant's as to the substance of this last conversation.

Following the incident on the 12th, Catherine called her former probation officer to tell him what had happened. He then told his supervisor. An investigation was begun. Grievant was sent a letter on January 25 informing him that a client of his had filed "a misconduct complaint" against him. He was placed on administrative leave with pay. Both Grievant and Catherine were interviewed. Following those interviews and upon completion of the investigation Grievant was sent a letter dated April 4, 2005. The letter recounted the events and then concluded:

Your position of Probation Officer, requires supervision and counseling of probationers, discretion, responsible use of power and good judgment as noted in ARC's Personal Conduct Policy #100-12 and the Interpersonal Associations & Sexual Misconduct Between Staff and Offenders Policy #100-23. Your conduct in this matter failed to meet these expectations and violates ARC's policies and expectations for professionalism.

Rule 100-12 provides in pertinent part:

Employees are expected to treat fellow employees, offenders and the public with respect and courtesy at all times.

Rule 100-23 states in part:

POLICY: Employees, volunteers and independent contractors will have a professional association with offenders and shall conduct such employment with personal detachment. Employees, volunteers and independent contractors will not maintain any interpersonal association with current offenders, their family members or with former offenders of any jurisdiction or their family members unless specifically approved. This policy does not prohibit professional/correctional relationships maintained between employees, contractors or volunteers with released offenders. The agency will investigate allegations of sexual contact, sexual abuse, and sexual harassment involving an offender and an employee(s), volunteer(s)/ student intern(s) or an independent contractor(s).

Pending his pre-termination hearing, Grievant remained in pay status.

Grievant had been told not to go back to Sugar Daddy's while the investigation was taking place. He did not go back there. However, following the receipt of the April 4 letter he did return.³ He talked to a waitress on one visit and said he was an investigator. He stated a friend of his had been discharged and he was looking for information about certain dancers. He specifically asked about Catherine. The waitress did not provide any information. On another occasion, he sat by the stage where the dancers perform and left a tip for Catherine at the "tip rail." That is a rail around the stage for customers to leave tips for the dancers. Catherine stated that she crumpled the dollars up and threw them back at Grievant. In total, Grievant returned to Sugar Daddy's three times following the receipt of the April 4 letter. The incident at the tip rail is the only encounter he had with Catherine during those visits.

A pre-termination hearing was subsequently held. Grievant was terminated and his pay ceased in June of 2005. Grievant filed complaints in several different forums following his discharge. Ultimately, the decision was made to pursue a remedy through this process.

POSITION OF THE EMPLOYER

A Probation Officer is in a high position of trust. The clients with whom the officer deals are highly vulnerable. The Probation Officer has power over them. Because of that power, the officer cannot cross certain boundaries. Grievant crossed those boundaries. He should not have frequently Sugar Daddy's since he knew Catherine was working there.

³ The Union has objected to the introduction of any evidence regarding Grievant's conduct following the issuance of the April 4 letter.

Grievant admitted that he went to Sugar Daddy's. He admitted he used a false name when asked. He admitted he made comments to Catherine about not harassing her. The Employer's Rules prohibit a Probation Officer from engaging in this type of conduct towards a client. Grievant violated those Rules.

Grievant during his interview and subsequent to it never acknowledged that what he did was wrong. He did not apologize. He blames everyone for this situation but himself. His failure to hold himself accountable for these actions provides additional justification for the action taken by the Employer. It supports the decision to discharge Grievant. Grievant lost sight of the fact that the client comes first and, thereby, caused a good career to end.

POSITION OF THE UNION

The Employer has ignored the facts in this case. The Employer alleges that the Grievant violated certain Rules. Grievant did not violate them. There was no just cause.

Catherine gave a statement to the Employer shortly after the incident. That statement varies significantly from what she said at her deposition. The Employer relied upon the allegations in the statement in making its decision. In that statement, Catherine said Grievant was intoxicated. She does not make that claim in her deposition. She claims in her statement that Grievant approached her, but does not say that in her deposition. Had the Employer used the information from the deposition, it would not have taken the action that it did.

Grievant had an exemplary work record. His evaluations were well above average. He is a long-term employee. He was fired for going to a men's club. That is not against the Rules. He had been there before he ever met Catherine. He refused her offer of a lap dance. He did nothing wrong. The Employer took the word of Catherine through her statement over the word of Grievant. It should not have. Grievant should not have been discharged and he should be reinstated with full backpay.

DISCUSSION

The Union contests some of the factual findings made by the Department. Before the Arbitrator can address the alleged wrongs committed by Grievant, he must address the questions raised by the Union as to what the facts truly were. Therefore, the Arbitrator shall make factual findings on each disputed point and then based on that finding reach a conclusion as to whether what Grievant did was wrong.

The Union to support its claim has strenuously argued that there is substantial inconsistency between the things contained in Catherine's statement that she gave to the Department during the investigation and her deposition that was taken in April of 2005. The Arbitrator has compared the two and finds there are some points that are inconsistent and others that are not. Furthermore, many of the statements made by Catherine in either or both her deposition and her interview were corroborated by Grievant. Those statements are taken as true and will be addressed later in this discussion. As for the alleged discrepancies that were not corroborated by Grievant, the Arbitrator agrees with the Union on several points.

Catherine did indicate in the statement that she felt Grievant was intoxicated the first time she saw him at Sugar Daddy's. She did not repeat that in her deposition. There has been no allegation that Grievant was unruly at Sugar Daddy's. He was also off-duty at the time. The Arbitrator will not consider any such allegation in his deliberations.⁴

The Union next argues that Catherine in her statement said that she approached Grievant and talked to him during their first encounter on January 13. They contend that in her deposition she said he came up to her. The Arbitrator has reviewed the deposition and it is silent as to who approached whom during this first encounter. The statement says she approached him. The Arbitrator shall credit Grievant's testimony that she came up to him when she asked his name and offered a lap dance. That she came up to him and that he refused her offer of a lap dance is important. While the Arbitrator as will be discussed below does find fault with some of the acts of Grievant, it would have been far worse had he made the first approach or accepted the dance.

These are the only two discrepancies that shall be addressed by the Arbitrator. The Grievant corroborated most everything else that was allegedly said. Therefore, even if there was an inconsistency from Catherine, the Arbitrator need only look to Grievant's statements to reach a factual finding. That is what shall now be done.

Grievant does not deny that he went to Sugar Daddy's on three occasions in January. Grievant defends this charge by stating that he had visited Sugar Daddy's prior to January 8, 2005. However, the Arbitrator finds it highly suspicious that he went three times within a week of learning she worked

⁴ Point 8 of the April 4 letter references this allegation.

there. He had not gone that often at anytime in the past. It is not unreasonable to conclude from these facts that he went there knowing full well that she might be there and he most likely expected she would be there performing.⁵ The Arbitrator finds that Grievant's going to Sugar Daddy's so soon after learning that Catherine worked there and his decision to go three times within a week was wrong.

The Employer has argued that Grievant's use of a false name was misconduct on his part and that it considered this when deciding to discharge Grievant. The Arbitrator agrees with the Employer as to what Grievant said to Catherine about his name, but disagrees as to what was said by him to another dancer. Grievant gave the other dancer a false name when Catherine asked her to find out the name of the person she suspected was Grievant. The Arbitrator does not find the fact that he gave a false name to this other dancer to be unusual. Rarely do patrons tell dancers their real name. He had no way to know Catherine had put this dancer up to this. He simply thought he was talking to a dancer who was approaching him. However, Catherine several days later asked Grievant his name and he again gave a false one. He knew Catherine was a client of his. He should have told her who he was. Lying to her was unquestionably wrong.

Grievant's next and last encounter with Catherine occurred when Grievant was leaving on January 13. He said several things to her. He addressed her by her first name. The Employer contends this put her in jeopardy. Had he used

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The Department alleges when Grievant saw Catherine, he should have immediately left Sugar Daddy's. Even though Catherine saw Grievant on January 8, there is no evidence he saw her. Thus, the only date this argument would apply would be January 12.

her full name, the Arbitrator would agree. Using her first name alone could not jeopardize her. Grievant indicated that he did not even know her stage name. There is no evidence that he did. He also stated that he did not feel any other patrons were in the area when he said her name. Catherine did say that others did hear him and later used her real name. Even if that is so, they still did not know her full name and thus could not find her in the phonebook or elsewhere. Based on these facts, the Arbitrator does not find the use of the real first name to be of great import, notwithstanding her feeling of discomfort by its use.

During this last encounter, Grievant asked Catherine if she knew who he was. She did not indicate that she did. As Grievant said, she had a quizzical look on her face when asked. Grievant then never answered his own question by telling her who he was. He was in reality playing games with her. As the Arbitrator noted earlier, Grievant should have acknowledged who he was. He had no right to engage in this repartee with her and to keep secret his true identity. By doing so, he compounded the wrong he committed earlier when he gave her a false name.

There is one last statement made by Grievant during this last exchange that must be discussed. The Employer believes Grievant erred when he told Catherine he was not there to hassle her and hoped she would not hassle him. It contends this statement was especially bad given Grievant's use of similar words during their official meeting. It views the statement as a threat. Grievant stated that he did not mean it as a threat.⁶ He only meant, in essence that he was not at Sugar Daddy's in his official capacity, but as another customer.

⁶ He did state during the investigation he meant he hoped she would not file a complaint against him when he made the statement, but that does not make the statement a threat.

While the use of the same word is troublesome, the Arbitrator does not find that this statement was meant as a threat, but was instead used in the context noted by Grievant. The statement was wrong when taken as part of the entire scope of what occurred, but it is not as serious as it would be if it were indeed meant as a threat.

The Arbitrator has sustained some, but not all of the factual findings made by the Employer. The Employer believes that all of the conduct of Grievant was not only wrong, but also violated several of its Rules. Rule 100.12 requires an employee to treat clients with courtesy. Grievant was not as truthful as he should have been, but he was not discourteous. The Arbitrator finds this Rule was not violated. Rule 100.23 prevents the Probation Officer from entering into “interpersonal relationships” with Clients. Grievant went to an establishment with adult entertainment. He correctly turned down Catherine’s offer of a lap dance. It cannot be said that by going Sugar Daddy’s Grievant entered into an interpersonal relationship with Catherine. Thus, the Arbitrator finds that this Rule was also not violated.

The above findings do not, however, exonerate Grievant. The Employer has also alleged that Grievant went beyond the boundaries inherent in the job by his actions towards Catherine. Grievant disagrees. He contends that he has often gone to places where clients work. He notes he lives in a small town and meeting clients is to be expected. He argues that Sugar Daddy’s is a public establishment and he has every right to go there. He believes it is no different than going to a restaurant where one of his clients works. The Arbitrator must disagree. Sugar Daddy’s is not like every place. At a restaurant, his client is fully clothed. Here, his client is dancing nude. There is a difference and

common sense should tell him so. While he did not violate any specific rule, he used extremely poor judgment and did cross the boundary between Probation Officer and Client. As a longtime employee, he should have known better.

Paragraph 5 of the letter Grievant received on April 4 states:

You stated you made no professional considerations about the impact your presence might have on the client and your ongoing need to supervise her probation and deal with her significant personal issues when deciding to patronize this client's place of employment, demonstrates a lack of respect for professional boundaries.

Grievant did fail to understand what impact his presence might have on his client. While Catherine made the choice to work in the type of place that she worked, Grievant still needed to use his years of experience to understand the discomfort she might feel next time they met professionally given the circumstances.⁷ For that lapse of judgment, he is responsible.

Grievant then compounded his mistake by being dishonest with the client. If he told her who he was, she could have said to him, "I am uncomfortable with you being here and asked him to leave." If that had occurred, and he left, this case might never have been. His decision to instead play games with her exacerbated his wrongs.

The bottom line is that Grievant placed his client in an uncomfortable position unnecessarily. His poor judgment started a chain reaction that led to her filing a complaint and his subsequent discharge. For these acts, he deserves discipline. The only question then is whether the level of discipline administered fits the offense.

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The April 4 letter also alleges that Grievant stayed at Sugar Daddy's on January 12 so he could get the two non-alcoholic drinks he got with his admission fee. There was no substantive testimony on this point and the Arbitrator gives no credence to this allegation.

Grievant was a long-term employee with an exemplary record. There was no prior discipline against him. All this must be taken into account in his favor. While there unquestionably are offenses for which discharge is appropriate despite the employee's excellent record, the Arbitrator does not feel this is such a case. Had the statement regarding harassment been found to be a threat as alleged by the Employer, the Arbitrator might be inclined to sustain the discharge? Grievant used extremely poor judgment in what he did, but the Arbitrator simply cannot conclude that what he did rises to a level that would justify immediate termination. The Employer's witnesses testified that they felt this was the most egregious offense regarding the crossing of boundaries that they could recall. The Arbitrator can understand their feelings, but cannot agree that when the entire scenario is taken in context that the offense is as egregious as they contend. The Arbitrator has made factual findings that are at odds with some of the findings made by the Department as reflected in its April 4 letter. Thus, the events did not rise to the level the Department believed them to be. The Arbitrator's conclusions as to the facts are critical to the Arbitrator's conclusion regarding remedy.

During the investigation, Grievant was told not to go back to Sugar Daddy's. He complied. Had he not, that would be a different situation than presented here. The Employer argues that Grievant did go back in April and that he was still employed at the time. Thus, it believes he did violate the Department directive. In April, Grievant received a letter informing him that the Department had made the decision to "dismiss you from employment." While he had appeal rights and was still being paid, it was clear that his days with the Department had ended from the Department's point of view, and that Grievant could

reasonably view it as that. Grievant did then go back to Sugar Daddy's to gather information for his appeal. The Union believes that the Arbitrator should not consider these after the fact events. The Arbitrator finds that Grievant's trips to Sugar Daddy's following the April 4 letter should not be held against him. He was fighting for his job. He believed for all intents and purposes he had lost it. He did not go back until after he received the discharge notice. Under this set of facts, his return to Sugar Daddy's should not be considered a violation of the directive previously issued.

While the Arbitrator does not feel discharge is warranted, the seriousness of the acts of Grievant should not be minimized. He lacked the good sense and judgment someone with his experience ought to possess. His years of service are in this case a two-edged sword. While it counts in his favor in determining the remedy, it also counts against him when evaluating the seriousness of his conduct. He knew more or should have known more than someone with far less experience. Grievant was severed from pay status in June of 2005. He thus has lost approximately eight months wages. The Arbitrator finds that Grievant deserved a 60-day suspension.⁸ He shall be made whole for all lost wages, less the period covered by the suspension. He shall retain and accumulate seniority for the entire period.

⁸ Catherine has since finished her probation and thus Grievant would have no contact with her.

AWARD

1. The grievance is sustained in part and denied in part.
2. Grievant shall immediately be reinstated to his former position.
3. The discharge should be removed from his file and replaced with a sixty-day suspension.
4. Grievant shall be made whole for all lost benefits, less the period covered by the suspension.
5. Grievant shall retain his seniority and shall accrue seniority from the date of his discharge through reinstatement.
6. The Arbitrator shall retain jurisdiction for no less than 45 days to resolve any issues regarding the implementation of this Award.

Dated: February 4, 2006

Fredric R. Dichter,
Arbitrator